

In the Matter of Merchant Mariner's Document No. Z-432189-D2 and
All Other Licenses, Certificates and Documents
Issued to: HENRY GUILLEN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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HENRY GUILLEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 1 September 1955, an Examiner of the United States Coast Guard at Houston, Texas revoked Merchant Mariner's Document No. Z-432189-D2 issued to Henry Guillen upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as an oiler on board the American SS DOCTOR LYKES under authority of the document above described, on or about 24 December, 1954 he assaulted a member of the crew, John King, with a dangerous weapon (a knife) causing a severe wound to the upper part of his right arm.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer and Appellant's counsel made their opening statements and the Investigating Officer introduced in evidence the testimony of the injured seaman, John King, and several documentary exhibits. At a later date, the Examiner received in evidence the deposition of the Chief Mate.

In defense, Appellant offered in evidence his sworn testimony and that of another oiler on the ship at the time. Appellant testified that King took out a knife when Appellant told King to stop whistling and singing in the passageway; Appellant kicked the knife out of King's hand and picked it up; King grabbed a fire ax and twice hit Appellant on the head with it; King was accidentally cut when Appellant tried to get the ax.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions,

the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-432189-D2 and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 24 December 1954, Appellant was serving as an oiler on board The American SS DOCTOR LYKES and acting under authority of his Merchant Mariner's Document No. Z-432189-D2 while the ship was in the port of Rijeka, Yugoslavia.

At about 2045 on this date, John King, a wiper, returned to the ship and went to his room which was next to Appellant's room. Shortly thereafter, King left his room. Appellant was standing in front of his room and complained to King about his whistling and singing. This led to an argument between the two seamen and an exchange of blows. King then went to the messmen's room.

At approximately 2100, King was returning to his room along the passageway which passed the Appellant's room. Appellant was standing in front of his room with a ten-inch homemade knife in his hand. No words were exchanged but Appellant chased King down the port passageway. When King saw that all exits from the passageway were closed, he attempted to take a fire ax off the bulkhead in order to defend himself. Appellant reached King and plunged the knife completely through the upper part of his right arm. Another seaman opened a door to the deck so King could get out of the passageway.

Appellant went to his room where he was confronted by the Chief Mate and two other ships's officers. The Chief Mate found two additional smaller homemade knives in Appellant's locker. It was apparent to the Chief Mate that Appellant had been drinking intoxicating liquor. The Chief Mate found a bottle of whiskey on Appellant's desk and he admitted ownership. When Appellant made an attempt to continue the fight with King, he was handcuffed to his bunk.

After both men were given first aid on the ship while waiting for an ambulance and the police, King was taken to the hospital in an ambulance and he remained there until 2 January 1955. He returned to the United States on another ship. Appellant was treated at the hospital for a cut over one eye and a scalp injury. He returned to the ship in less than two hours and returned to duty

on the following day.

Appellant's prior record consists of a probationary suspension in 1945 for desertion from his ship.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

1. The Examiner erred in considering the prior record of Appellant before finding that at least one charge had been proved as required by 46 CFR 137.09-70.

2. The Examiner erred in considering the deposition of the Chief Mate which had not been offered in evidence. Hence, Appellant was deprived of his right to object to any part of the deposition.

3. The Investigating Officer failed to sustain his burden of proof because he did not produce witnesses who could have verified or denied King's accusations. Since the Investigating Officer conducted an investigation, it must be assumed that the testimony of other witnesses would have been contrary to that of King. Also, King could have returned to the messmen's room rather than running for a fire ax if he saw Appellant with a knife.

4. The order of revocation is harsh and unjust in view of the directly conflicting testimony of King and Appellant. This action deprives Appellant of his livelihood and results in hardship for his entire family of six.

In conclusions, Appellant requests that the decision be set aside and reversed and the case remanded for another hearing.

APPEARANCES: C. B. Stanley, Esquire, of Houston, Texas, of Counsel

OPINION

It is my opinion that it would not serve any useful purpose to remand this case for further hearing. The record does not indicate that there were any eye witnesses, other than King and Appellant, to the events immediately preceding the time when the former was seriously injured when stabbed with a knife wielded by Appellant. Appellant testified that there were no witnesses to the fight.

It was within the province of the Examiner to determine the question of credibility with respect to the directly conflicting

testimony of the Appellant and King. The Examiner specifically stated that he accepted the testimony of King rather than that of Appellant and several sound reasons were stated for this choice: The Chief Mate contradicted Appellant's testimony that he had not been drinking intoxicating liquor and that he had no whiskey in his room; on direct examination, Appellant denied having a prior record of misconduct with the Coast Guard; two other homemade knives were found in Appellant's room; and it is not likely that Appellant would have received only minor wounds and been able to return to work the following day if he had been hit on the head twice with a fire ax. One such blow would probably have eliminated the possibility of injury to Kin.

According to Appellant's own version, he must have been pursuing King with the knife since Appellant testified that their conversation started near the entrance to the showers. This was about 25 feet from the ax and midway between the location of the ax and Appellant's room. This testimony and also the fact that Appellant later had to be restrained from attacking King are ample indications as to Appellant's belligerent and aggressive mood at the time. Understandably, King felt that it was time to run for his life rather than to try to get back in the messman's room when Appellant was approaching with a knife.

Appellant's prior record was brought out on cross-examination after he had denied having a prior record on direct examination. It is obvious that 41 CFR 137.09-70 was not intended to preclude the use of a prior record for the limited purpose of impeaching the credibility of the person charged.

As to the deposition of the Chief Mate, counsel for Appellant conceded in his argument that he considered the deposition to be in evidence before the Examiner. Immediately preceding counsel's argument, there was a discussion concerning the deposition but counsel did not object to it after it had been received in evidence by implication which he thereafter acknowledged.

Additional testimony could only have been obtained by deposition. Counsel for Appellant was given ample opportunity to avail himself of this means of obtaining evidence. The Investigating Officer stated that he showed Appellant's counsel sworn ex parte statements of other seamen on the ship but counsel apparently did not think depositions from such seamen would benefit his client's use. Near the conclusion of the hearing, Appellant's counsel was asked if he had any further evidence or witnesses and he replied that he had no further evidence. Thus, there is no basis for the contention that it must be assumed that the testimony of other witnesses would have been contrary to that of King.

There is no doubt that the order of revocation is a severe one for a seaman with as many years experience as Appellant. Nevertheless, the order will be sustained because of the vicious propensities shown by Appellant in this attack upon one of his fellow crew members. Other seamen should not be exposed to such an unnecessary danger.

ORDER

The order of the Examiner dated at Houston, Texas, on 1 September 1955 is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 19th day of December 1955.